VIRGINIA LAW REGISTER

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Laws to Regulate Aviation.

The "law of gravitation" seems so far to have been the only law which has up to this date regulated aviators and aviation. Under it the death sentence has been pronounced upon over thirty poor fellows who have felt the force of this law in the last twelve months. Now comes an executive —Governor Baldwin, of Connecticut—and in his first message to the Legislature of that State makes the following suggestion:

> "Flying machines, and though to a less extent, dirigible balloons, put in danger all over whom they sail.. * * * It is not improbable that they will be used before long as a regular mode of transportation between distant places and already they are frequently directed through the air in connection with public exhibitions or by way of experiment. I recommend the passage of a statute providing for their registry in the office of the town clerk in each town in which one is owned, forbidding their use for flights within this State unless in charge of some one approved by competent authority as capable of directing their course with due skill and care and making the owner, lessee or charterer liable for all damages resulting from any voyage in one without proof of negligence or fault in its management."

This law might be very well passed, but it seems to us the time is coming when laws of wider scope must be passed. To the making of such laws wisdom and care must be used to prevent "freak legislation," and to check unnecessary restrictions upon this art, whose future no man dare predict. Countless questions will necessarily arise and there is little precedent to aid the statute constructor. The stage coach gave rise to cases which "set the pace," so to speak, for questions which arose in the operation of railways. But there are no precedents which can be found for the cases which must of necessity arise with the growing use of air ships. Law and precedent are yet on this subject "in the air."

The Police Power Once More.

In Noble State Bank *v.* Gov. Haskell and the State Banking Officials of Oklahoma and two other similar cases, the now very familiar "police power" bobs up in a very surprising way, if it were possible for any aspect of the "police power" to be surprising These three cases were decided by the Supreme Court of the United States on January 3rd of the present year.

The Oklahoma Legislature passed an act on Dec. 17, 1907, creating a State Board of Banking Commissioners and providing for the guarantee of deposits. The Board was directed to levy 1 per cent upon the average daily deposits in the various banks, subject to the act to supply the fund. By the act signed on March 11, 1909, this assessment was raised to 5 per cent. If an Oklahoma bank fails the Commissioners immediately draw from the guarantee fund whatever is necessary to pay the depositors in full at once. A lien is reserved on the assets of the failing bank to make good this draft upon the guarantee fund.

The Noble Bank, plaintiff in the Oklahoma case, is not insolvent, and did not combat the law on that ground. It objected on the ground that being solvent, it could not be called upon to contribute towards paying the depositors of other banks, under § 10 of Article 1 and the Fourteenth Amendment to the Federal Constitution. Section 1 forbids any state to pass any law impairing the obligation of contracts, and the Fourteenth Amendment forbids the taking of property without due process of law.

Justice Holmes, who delivered the unanimous opinion of the court (seven judges only sitting) in the main case, seemed to admit that there might be a slight infringement of the Fourteenth Amendment to the Constitution, but like the baby in Maryatt's novel it was too small to amount to anything. But the act in his opinion came clearly within the police power of the state, which he says "in a general way extends to all public needs." Munn *v.* Illinois, 94 U. S. 113, went pretty far in holding that when property becomes clothed with a public interest by being used in a manner which affects the community at large its owner "must submit to be controlled by the public for the

common good to the extent of the interest he has then created," but this case we think goes a bow-shot further.

It was argued that if the state should then guarantee bank deposits, why not guarantee the solvency of grocers, and they might have gone further—why not the solvency of all accounts on the grocers' books? But the Justice waives this aside and falls back upon the police power. He says:

> "With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on opposing sides. It will serve as a datum on this side that, in our opinion, the statute before us is well within the State's constitutional power, while the use of public credit on a large scale to help individuals in business has been held to be beyond the lines.
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> "The question we have decided is not much helped by propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the former, and as it will have to be considered in the following cases, if not here, we will dispose of it now. It is not answered by citing authorities for the existence of the right at common law.
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> "There are many things that man may do at common law that the States may forbid. He might embezzle until a statute cut down his liberty. We can not say that the public interests to which we have adverted and others are not sufficient to warrant the State in taking the whole business of banking under its control. On the contrary we are of the opinion that it may go on from regulation to prohibition, except under such conditions as it may prescribe.
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> "In short, where the Oklahoma Legislature declares by implication that free banking is a public danger, and that incorporation, inspection, and the above described co-operation are necessary safeguards, this court certainly can not see where it is wrong."

It is a comfort, however, to old fogies like ourselves to see the police power this time standing guard over the right of the Sovereign States to manage and control their own creatures and to pass such laws as they deem wise as to institutions within their own borders.

The Alabama Labour Contract Law.

No such good fortune, however, befell the Sovereign State of Alabama in its effort to prevent fraud on the part of labourers receiving advances for services to be performed and their walking off with the advance and leaving the labour unperformed.

The law made it a misdemeanor for any person to enter into a contract to labour, receive advance pay, and then fail to do the work without refunding the money advanced. Alonzo Bailey, a negro, made a contract to labour as a farmhand for one year, received $15 advanced pay, to be returned at the rate of $2.25 a month during his service, but quit work after a month and a few days. He was arrested, convicted and assessed a fine of twice the amount of the advanced pay, half of which was to go to his former employer and half to the state.

When his case came to the Supreme Court the Department of Justice participated in the argument "as a friend of the court," claiming that "the thirteenth amendment to the Constitution was violated."

Justice Hughes who delivered the opinion of the court, overruled this contention, holding that there was nothing in the statute which discriminated against the negro. He treated the case as if it had come from New York or Massachusetts. The court held that the statute reduced a person to involuntary servitude by the indirect method of making his failure to pay a debt a crime and that it was therefore unconstitutional.

The main question, it seems to us, in this case, and the evil attempted to be cured does not seem to have been touched upon by the court. Surely the "police power" of a state would allow it to make the obtaining of goods or money by false pretenses a crime punishable by fine or imprisonment. This was the evil the statute intended to cure. Money was obtained in advance under a promise to do a certain thing, and being obtained by a false promise a crime was committed which it was in the police power of the state to punish, and by punishment to attempt to prevent others committing the same illegal act. This—a growing evil in the Southern States, cursed by a class of labourers with no sense of the sacredness of a contract—in our judgment was within the clear right of the state to do. If it could protect de-

positors in one bank at the expense of the stockholders in another, surely it had the right to protect the community from what was practically a theft. Imprisonment for failure to pay a debt was for many years the law in well nigh every state in the Union. There is no inhibition even now in the Federal Constitution against it. Does the fact that it was a debt to be paid in services make any difference?

The Panama Libel Suit.

The pendulum swung back, however, in the so-called Panama Libel suit, in which the Supreme Court—speaking through Chief Justice White—held that the act of Congress passed in 1898 under which the Press Publishing Company was indicted for a libel gave no jurisdiction to the Federal Courts, the offense—if offense there was—being clearly punishable in the State courts. The Government's claim was that the libel (in the New York World) was published and uttered upon Federal territory at West Point and in the Post Office Building in New York City. In sustaining the lower court's dismissal of the indictment, the Chief Justice said:

"First, that adequate means were afforded for punishing the circulation of a libel on a United States reservation by the State law and in the State courts without the necessity of resorting to the courts of the United States for redress;

"Second, that resort could not be had to the courts of the United States to punish the act of publishing a newspaper libel by circulating a copy of the newspaper on the reservation, upon the theory that such publication was an independent offense, separate and distinct from the primary printing and publishing of the libelous article within the State of New York, without disregarding the laws of that State and frustrating the plain purposes of such law, which was that there should be but a single prosecution and conviction.

"These propositions being true," he goes on, "it follows in the light of the construction which we have given the act of 1898, that the court was right in quashing the indictment as not authorized by that act. No other conclusion, we think, was possible, as the court could not have sustained the indictment without giving to the statute a mean-

ing directly conflicting with the construction which we have affixed to it.

"The ruling which we now make does not of course extend to a subject which is not before us. It follows, therefore, that we do not now intimate that the rule which in this case has controlled our decision would be applicable to a case which was wholly committed on a reservation disconnected with acts committed within the jurisdiction of the States, and where the prosecution for such crime in the courts of the United States, instead of being in conflict with the applicable State law, was in all respects in harmony therewith."

This decision has been hailed with a universal burst of approval from the leading newspapers of the United States. It probably may not be recalled that the prosecution in the case was directly brought about by the influence of Theodore Roosevelt, whilst President of the United States.

Insurance—Trust "Busting."

In the case of the German Alliance Insurance Company *v.* Hale the Supreme Court of the United States on January 16th upheld the statute of the state of Alabama granting to any insurance beneficiary, in addition to the legally assessed damage due him, 25 per cent more in case the insurance company either at the time of issuing the policy or after issuing it, before the trial comes up, is shown to be connected in any way with an association organized for the purpose of fixing insurance rates. The language of the Alabama statute providing for this additional punitive 25 per cent payment allows it to the insured.

"If at the time of making such contract or policy of insurance or subsequently, before the time of trial, the insurer belonged to or was a member of or was in any way connected with any tariff association or such like thing by whatever name called, or which had made any agreement, or had any understanding with any other corporation or association engaged in the business of insurance, agent or otherwise, about any particular rate, or premium, which should be charged or fixed for any kind of classification of insurance risk."

This statute was attacked as unconstitutional in a suit broug

by Hale, who sustained a loss by fire consuming some 300,000 feet of lumber insured in the German Alliance Company. The case was removed from the state to the Federal court, where Hale recovered a verdict. The company appealed, claiming, as we have said, the unconstitutionality of the law; that its property was taken without due process of law, etc.

Mr. Justice Harlan, who delivered the opinion of the court dismissed the contention of the company that the 25 per cent additional penalty was taken without due process of law and held that the Alabama statute was evidently aimed at preventing monopolies, and that any relevant methods pursued in achieving the State's object could not be called a deprivation of the due legal process.

The State, says the decision, evidently considered an association fixing the rates of insurance as an evil of a monopolistic sort. The insurance business is described as a peculiar one, affecting a great number of people. These people, says the decision might easily be at the mercy of the company in the matter of rates, and this gives the State special care of such corporations.

The decision asserts that the State could, if it so pleased in its warfare against the offensive associations, prohibit them from doing business within the State, and that it could in like manner certainly mulct an offending corporation to the extent of 25 per cent. or more of the policy in question. While the method pursued by the State of Alabama might not be the best possible solution of the monopoly evil, recites the decision, its method is certainly germane to a legal object, and therefore stands every test before the Federal courts.

The Law as to the Probate of Wills.

In the LAW REGISTER of October, 1908, vol. 14, p. 470, we called attention to the curious fact that the limitation to appeals from the decision of a *clerk* where a will was probated in the *office* was *one* year, whereas if it was probated in *open court* before the judge the limitation was two years. The reverse ought to be the case. Our attention has been

called also to this further curious fact that where the will is probated ex parte in *court* under § 2544 of the Code, a bill in equity is necessary to test the validity of the will, whereas if probated in the clerk's office ex parte before the clerk, under § 2639a a party wishing to contest is required to *give bond* and appeal to the circuit court.

No bill in equity can lie from the *clerk's* decision and a party desiring to question the validity of the will must be put to the trouble of giving bond and security before he can appeal. And yet if the will is probated in court before the Judge, a contestant need give no bond, but has to apply to the Judge sitting in a court of equity to test that which he did as a probate judge. Surely if any of our statutes need careful revision and rewriting this "probate statute" of ours does.

Full Faith and Credit.

THE REGISTER has always been a firm believer in the full faith and credit clause of the Federal Constitution, and thinks that it or a clause of similar character should be in force as to relations between legal periodicals. It always affords us great pleasure, and we may say pride, to see any of our articles copied in any other law journal if we are given "full credit" for the same. But we feel equally distressed when we find that a periodical borrows from us and gives us no credit. On page 410 of the December number of the *Lawyer and Banker and Bench and Bar Review,* published in Tacoma, Washington, our editorial at page 464 of our October number is copied verbatim, literatim et punctuatim, but no credit is given to this periodical for that editorial. We respectively call the attention of our learned contemporary to this omission, and whilst we withhold none that it may desire to copy from our REGISTER we beg that it will credit us. They may be "poor things," but they are "our own."

Amongst the important cases now under argument or about to

Virginia and West Virginia.

be argued in the supreme court of the United States at its present term, none can prove of greater interest to Virginians than the pending litigation between the two sovereign commonwealths. The case came up Friday, Jan. 21st, for hearing upon the merits and the court has allowed counsel until the following Thursday for argument, which is an unusually liberal allowance even for a case of such importance. The auditor to whom the case was referred found that the indebtedness of the State of West Virginia to the State of Virginia was exceedingly large, and the former State of course has excepted to this report and will fight the whole case upon every possible question which may arise. It might be well, in view of the importance of the case, to quote what Mr. Justice Field said in the case of Hartman *v.* Greenhow, 102 U. S. 677:

> "But as the whole state had created the indebtedness for which the bonds were issued, and participated in the benefits obtained by the moneys raised, it was but just that a portion of the indebtedness should be assumed by that part which was taken from her and made a new state. Writers on public law speak of the principle as well established, that where a state is divided into two or more states, in the adjustment of liabilities between each other, the debts of the parent states should be ratably apportioned among them. On this subject Kent says: 'If a state should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, their rights are to be enjoyed and their obligations fulfilled by all the parts in common.' 1 Com. 26. And Halleck, speaking of a state divided into two or more distinct and independent sovereignties, says: 'In that case, the obligations which have accrued to the whole before the division are, unless they have been the subject of a special agreement, ratably binding upon the different parts; this principle is established by the concurrent opinions of text writers, the decisions of courts and the practice of nations.' International Law, c. 3, § 27."

An important question arises in regard to the process by which the Supreme Court of the United States can enforce its decree in case the finding shall be against the State of West Virginia. The present Chief Justice in South Dakota *v.* North Carolina,

192 U. S. 327, in his dissenting opinion discussed this question at some length, and based his dissent, which was concurred in by the late Chief Justice and Mr. Justice Kenna and Mr. Justice Day, on the ground that there was an absolute want of power in the court to render a decree between the two states on the cause of action sued on, because of the familiar rule that a court of equity will not render a decree which it cannot enforce. In that case there was collateral that was put up and sold. But in Virginia *v.* West Virginia the complainant can only realize his claim through the taxing power of the State of West Virginia, and is there any way by which the court could compel the defendant to exercise this power?